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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER GRIFFIS, Defendant and Appellant.	B284781 (Los Angeles County Super. Ct. No. BA445708)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Remanded for sentencing; and judgment otherwise affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christopher Griffis of first degree murder of Lorenzo Amrosio (Pen. Code, § 187, subd. (a)) and shooting at an occupied building (§ 246).[1] The jury found the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C), (b)(4)) and a principal personally and intentionally discharged a firearm in the commission of the crimes (§ 12022.53, subds. (d), (e)(1)). The trial court sentenced Griffis to an aggregate prison term of 50 years to life.

Griffis contends:

(1) The evidence is insufficient to support his murder conviction.

(2) The trial court erred by allowing expert testimony that was improper because it was (a) based on a hypothetical that did not track the facts in this case, (b) contained an opinion on Griffis's knowledge and intent, and (c) included a legal opinion on whether a crime was committed. He also contends his lawyer's failure to challenge the testimony was ineffective assistance of counsel.

(3) The court violated his constitutional right of confrontation by allowing an expert to express an opinion, based on case-specific testimonial hearsay, that Griffis was a gang member. He also contends his lawyer's failure to challenge the testimony was ineffective assistance of counsel.

(4) The court erred by admitting his recorded interrogation without redacting certain prejudicial statements by the police. Additionally, he contends his counsel's failure to challenge the interrogation evidence was ineffective assistance of counsel.

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[1] All undesignated statutory references are to the Penal Code.

(5) The court erred by admitting unauthenticated social media evidence.

(6) The errors were cumulatively prejudicial.

(7) There was no proper basis for the firearm enhancements.

(8) The matter should be remanded to allow the court to decide whether to exercise its discretion to strike the firearm enhancements.

We conclude substantial evidence supports Griffis's conviction, and Griffis has shown neither prejudicial error nor ineffective assistance of counsel. We agree, however, and the People concede, the matter should be remanded to allow the trial court to decide whether to strike the firearm enhancements under section 12022.53.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Prosecution Evidence*

A. *The Killing of Bradford Smith*

The Rolling 20's Bloods and Rolling 30's Harlem Crips are rival street gangs in South Los Angeles. Bradford Smith was a Rolling 20's member with the moniker Baby Slick. Early in the evening of March 14, 2016, during a spate of violence between the two gangs, Smith was shot and killed in front of 1801 West Adams Boulevard. That location is within territory claimed by the Rolling 20's.

Later that evening, a large group of people gathered near the body where they burned candles and conducted a vigil. Officer Richard Rivera of the Los Angeles Police Department testified he attended the vigil. Officer Rivera saw Griffis there

and asked him if he was a gang member. Griffis responded he was and identified his gang as the Rolling 20's.

B. *The Killing of Lorenzo Ambrosio*

Surveillance video recorded late that evening showed a white Malibu passing by Sammy's Liquor Store on Jefferson Boulevard at Ninth Avenue three times within a short time period. That location is within a territory claimed by the Rolling 30's. First the Malibu drove westbound on Jefferson and turned north onto Ninth Avenue. Approximately three minutes later, the Malibu traveled the same route, passing by the liquor store a second time. The video then showed two people in a parking lot running and shooting at the Malibu. A few minutes later, the Malibu passed by the liquor store again, this time traveling eastbound; there were "sparks" (apparently muzzle flashes); and a man riding a bicycle outside the liquor store fell to the ground.

Lorenzo Ambrosio, the man on the bicycle, was shot and killed. He was an innocent bystander who happened to be at the wrong place at the wrong time. The shooting occurred at approximately 10:43 p.m. Ambrosio suffered a gunshot wound to the pelvis and a lacerated femoral artery. He died at the scene from the resulting loss of blood.

On February 8, 2016, a few weeks before the Ambrosio shooting, Officer Brian Schneider stopped a white Malibu driving near Adams Boulevard and Van Buren. Kayveon Livingston was the driver. Griffis and two other men were passengers in the car. Livingston and Griffis both identified themselves as members of the Rolling 20's. Officer Schneider was familiar with the other two passengers from prior stops and arrests.[2]

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[2] Officer John Thompson testified he had contacts with the other two passengers, Dalvin Merritt and Brandon Walker, and

C. *Griffis's Arrest and Interrogation*

1. *The Arrests and Initial Jail Cell Conversation*

On June 22, 2016, police arrested Griffis and Livingston for the Ambrosio murder. They were taken to the police station and placed in the same cell. Using a clandestine recording device inside the cell, police recorded their conversation. The prosecution played the recording for the jury.

Griffis and Livingston discussed the circumstances of their arrests. Referring to another man, Griffis stated, "He said I was going, and it happened." Griffis said, "You got to watch [that man], Blood. Because how he know that? You feel me?" Griffis stated, "Let's pray, I hope he ain't no informant, fool."

Griffis told Livingston the police had told him he had to talk to some detectives. Livingston stated, "Don't say shats. I ain't saying nothing." Griffis responded, "Man, come on, homie. I'm solid." Livingston replied, "You know I ain't saying [sh*t]. I don't have nothing to say to them."

2. *The Interrogation*

Detective Rene Castro and Officer Christopher Courtney interrogated Griffis at the police station and recorded the interrogation. The recording of the interview was also played for the jury. Griffis changed his story throughout the interrogation. He acknowledged being a member of the Rolling 20's, but claimed he no longer frequented the neighborhood. He acknowledged seeing Livingston around but did not know his name. Griffis was evasive regarding his familiarity with Livingston's car.

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knew Merritt to be a Rolling 20's member. Officer Thompson stated he had stopped Walker several times and Walker was always with Rolling 20's members.

Griffis stated Smith was like an older brother to him and he was saddened by Smith's murder. Griffis acknowledged going to the vigil on the evening of Smith's death, but denied seeing Livingston there. The officers asked about a murder that occurred in Rolling 30's territory after Smith was killed. Griffis claimed he had not heard about the murder. He said he had spent most of the evening at a girlfriend's home. When the officers stated other witnesses had placed him in Livingston's car that night, Griffis denied being in the car.

The officers told Griffis several times he was not telling the truth. When Griffis said he did not have a cell phone in March 2016, the officers insisted he was lying again. Griffis then acknowledged, "Okay. I had a phone. Okay." After further questioning, Griffis told the officers about one week after Smith was killed Livingston told Griffis he had gone to Rolling 30's territory alone and shot somebody. Griffis then changed his story, stating Livingston said there was someone else in the car with him who did the shooting.

The officers told Griffis tracking of his cell phone and tracking of Livingston's cell phone indicated the two were together in the shooter's car. This was false. The tracking information available to the officers showed the location of Livingston's cell phone in the area of the Ambrosio shooting, but did not disclose the presence of Griffis's cell phone in that area.

Griffis stated Livingston's car "was shooter" and Griffis was in another car "trailing" behind the Malibu. Griffis stated, "I wasn't in Kayveon car, because Kayveon car was the one that was shooter [sic]." Griffis stated, "I was in the other vehicle." Griffis first said the second car was a gray truck, but later said it was a gray Hyundai whose driver was an "older homie." The

police asked Griffis, "what was the plan?" Griffis responded, "Trying to go find something," and, "We was gonna just try to let—just let—let anger out . . . ."

The officers told Griffis he kept changing his story, which led them to believe maybe he was the shooter. Griffis said he was not the shooter. The interrogation continued:

Officer Courtney: "Then what happened?"

Griffis: "That they went to go shoot. I was in another vehicle."

Officer Courtney: "There wasn't another vehicle."

Griffis: "It was. If you look at that tape, I know there's a gray Hyundai and that vehicle."[3]

Officer Castro: "Okay. And when you guys left, they were gonna go look for 30's. Is that what happened?"

Griffis: "That's what that car was doing."

Officer Castro: "But you took off with that car. You guys took off following that car."

Griffis: "Yeah, but the older homie didn't tell me, because I asked him, 'what's going on?' He said, 'Just look and watch.' "

Officer Castro: "What did that mean to you?"

Griffis: "Look and watch. Now, I—I'm thinking, oh, yeah, they finna go shoot something or they finna go do something that they not supposed to."[4]

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[3] After the interrogations, Officer Courtney reviewed all of the surveillance videos. He did not see any car following the Malibu, did not see any other car appear more than once in the videos, and did not see a gray truck or Hyundai.

[4] "Finna" is a slang term for "fixing to" or "gonna."

Officer Castro: "When you got in the car, did you know—in your head without anyone telling—telling you anything, you knew what was gonna happen?"

Griffis: "No. I knew it start happening when we started going in the area, not just, okay, we at the candlelight. Everybody get in they cars. We already know what—what up. We got a plan. No."

"Everybody in motion. People still crying. Like, it was more so, like, the older homie he, like, that car finna—yeah. Like they finna do they thing. They finna do their job. And we just trailer."

The officers asked Griffis to identify the driver of the trail car and the people in the lead car. They showed him pictures of several individuals. Griffis identified some of the participants, but said he did not see everyone who got in the lead car.

The officers took a break. When they returned, Officer Castro said they were puzzled about some of the missing details. He told Griffis they were leaning toward the conclusion Griffis was leaving out details because he was the shooter. Griffis said he was not the shooter.

Officer Courtney stated: "I don't know if you don't understand, and let me explain it to you is that whether you were in this second car or you're—and not shooting—or you're in that—you're in that first car and you're not shooting, it's the same difference. It means the exact same thing. It's only different if you're pulling the trigger. So whether you tell us you're in car B or—and just sitting there as a bystander watching what's going on or you're in car A doing the exact same thing, in the eyes of the law, that's the same thing. There's no difference between it."

Griffis then identified Tiny M as the shooter and said Tiny M was riding in the Malibu with an "AK." Griffis said he met with some others at a laundromat near the vigil on the night of the vigil. When the police asked Griffis how he knew Tiny M was the shooter, Griffis said Tiny M was the last person who had the AK and "the only one talking about it." Griffis said when he saw Tiny M walking to the car "he had [the AK] in his pants."

3. *The Second Jail Cell Conversation*

After interrogating both Griffis and Livingston, the police placed them together in the same cell and again recorded their conversation. The prosecutor also played this recording for the jury. Griffis said, "Police know your car. And they trying to catch us for that hot one." Livingston said, "You didn't say nothing, right?" Griffis assured Livingston he said nothing. Griffis said the police were talking about "the phone" and "our phones" showing the two men at the same location.

Griffis said, "How the [f***] is our phones in the same location, fool?" He said, "And then they said that our phone, shats, is—was in the area. How is that possible? Yeah, we left it at DM house. That day." The conversation continued:

Griffis: "Man, that [sh*t] coming—my [sh*t] online, fool. Remember all them the phone calls, yeah, this bitch is like, 'The shats in here.' "

Livingston: "Man, it was supposed to be the airplane mode, shats."

Griffis: "Those calls—"

Livingston: "The shats was supposed to be off. The shats was off."

Griffis: "It was on. Remember?"

Livingston: "Whatever they got, they got it, bro."

Griffis: "Uh-huh."

Livingston: "Just don't give them nothing else. That's it."

Livingston said, "I wasn't there. I wasn't driving. The car, I guess, was there. They saying it was, but, [sh*t], I don't remember. I wasn't there. I wasn't driving." He said, "Just because it's my car, don't mean I'm in the [mother*****]."

Griffis said the police had seen his Facebook records. "And they read—they said my Facebook name. They said, 'G—Gt the Mess' "; and, "Well, how they read—bro, I'm still trying to figure out how they get on my Facebook, fool."

D. *The Cell Phone Evidence*

Cell phone records indicated that on March 14, 2016, from 8:59 p.m. to 9:15 p.m., Livingston's cell phone moved from west to east toward the area of 1801 West Adams Boulevard, the site of the Smith shooting. From 9:34 p.m. to 9:55 p.m. the phone moved south from that area, and then west toward the area of Jefferson Boulevard and Ninth Avenue, the site of the Ambrosio shooting. From 10:01 p.m. to 10:29 p.m., the phone moved back east toward the area of 1801 West Adams Boulevard. From 10:32 p.m. to 10:40 p.m., Livingston's phone was in the general vicinity of Jefferson Boulevard and Ninth Avenue. At 10:47 pm. and 10:55 p.m., the phone connected with cell phone towers in the general vicinity of 1801 West Adams Boulevard.

Cell phone records for Griffis's cell phone showed activity from 9:20 p.m. to 9:23 p.m. on March 14, 2016, indicating the phone was in the general vicinity of 1801 West Adams Boulevard. From 9:21 p.m. until 10:55 p.m. that evening, the phone did not connect with any cell tower in the area, indicating the phone was either turned off, in airplane mode, or in an area with no cell tower coverage.

According to the cell phone records, at 10:55 p.m. that evening both Griffis's and Livingston's cell phones connected with cell towers in the area of 1801 West Adams Boulevard, indicating both phones were in the area at that time.

E. *The Gang Expert Testimony and Social Media Evidence*

Officer Thompson testified as a gang expert. He explained the importance to gang members of controlling territory by committing acts of violence and instilling fear. He described gang members' expectation that fellow gang members will commit crimes for the benefit of the gang, ranging from acts of vandalism and robberies to revenge murders. He said gang members gain status within the gang by committing acts of violence, and particularly by committing a revenge murder against another gang believed to be responsible for killing a fellow gang member.

Officer Thompson also testified that the Rolling 20's Bloods and Rolling 30's Harlem Crips are rival gangs in adjacent neighborhoods, with Jefferson Boulevard forming a boundary between the two gang territories. At the time of the Smith and Ambrosio murders in March 2016, the number of shootings of gang members was particularly high. In such an environment, when a gang member is shot his fellow gang members assume the shooting was committed by the rival gang.

Officer Thompson further testified that to mislead law enforcement and witnesses gang members often use a "trail" car to attract attention away from the car carrying the shooter. By riding in a trail car a gang member can assist in the commission of a crime and enhance his status within the gang.

The prosecution presented records from a Facebook account under the name "Gt da Mess." Griffis had acknowledged in his

police interview that he had a Facebook account under that name.[5] Photographs posted on the account showed Griffis and other Rolling 20's members making gang-related hand gestures, including a gesture Officer Thompson interpreted as "[f***] Crips." The words "[f***] Barlem" appeared on the Facebook account, which Officer Thompson interpreted as referring to the Rolling 30's Harlem Crips. "RTB.I.P baby Slick" also appeared, which Officer Thompson interpreted to mean "Rolling 20 Blood in peace" and a reference to Smith, as a tribute to a fallen gang member. Under that language there were several emojis depicting a crying face, hands praying, thumbs down, and a gun emoji.

Records from the Facebook account included a message to Kyra Pearson identifying the sender as "Chris," a message from Pearson stating her cross streets within the Rolling 30's neighborhood, and a message to Pearson stating, "im from twentys." Another message to Pearson stated, "Okaay u kno not far from me u just in the barlemsk thats out for me."[6] Officer Thompson interpreted the last message as indicative of a Rolling 20's member who could not safely enter rival territory. Referring to Smith's death, Pearson stated shortly after midnight on March 15, 2016, "Yea, this shit ain't no joke? I'm really finna cry." A message to Pearson responded, "Man to late for that. we did that.

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[5] When the police asked Griffis about the Facebook user name Gt da Mess, he responded, "That's one I—I—I—don't know my password to."

[6] Officer Thompson testified "Barlem" refers to the Rolling 30's Harlem Crips. Rolling 20's members use that term to show disrespect for their rivals. "K" refers to killer and is added to a rival gang's name.

we going back. we already went for blxxd."[7] A status update posted on the account shortly after midnight stated, "Body for body."

2. *The Defense Evidence*

Griffis and Livingston were tried together in a single trial with separate juries. Griffis did not call any witnesses. Livingston testified in his own defense, called his great uncle as a character witness, and called a university professor as a gang expert.

Livingston denied any participation in the Ambrosio murder. He testified he was never "jumped in" the Rolling 20's so he was not a member, but only an affiliate. Livingston stated he allowed a friend, Trayvonne Adams, to borrow his Malibu and mistakenly left his phone in the car charging. Livingston stated he borrowed a friend's phone and called his own phone number several times. According to Livingston, when Adams returned with the car almost 30 minutes later there was a bullet hole in the rear bumper.

3. *The Verdict and Sentencing*

The trial court instructed the jury on first degree murder based on theories of aiding and abetting and conspiracy, and instructed on shooting at an occupied building.

The prosecutor argued Griffis was in the Malibu at the time of the Ambrosio shooting, and there was no second car. The prosecutor argued Officer Courtney had reviewed hours of videos recorded that night and testified he never saw a car trailing the Malibu as described by Griffis. He argued, "Mr. Griffis committed that murder along with Mr. Livingston, along with

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[7] Officer Thompson testified Rolling 20's members sometimes spell "blood" with two x's to signify the number 20.

other members of Rolling 20's who aren't here with us today." He argued there was no evidence Griffis was the shooter, but Griffis was guilty of murder either as an aider and abettor or a co-conspirator. The prosecutor argued even if Griffis was in a trail car, he knew people in the lead car were going to commit a revenge murder and was responsible as a co-conspirator.

Defense counsel argued one of the videos showed a gray car following behind the Malibu, and there was evidence Griffis was in the gray car. Counsel argued Griffis told the truth when he stated in the interrogation he did not know what was going to happen when he went in the trail car. Counsel argued the trail car left the area of the shooting two or three minutes before the Ambrosio shooting occurred, so Griffis abandoned any conspiracy and did not aid and abet the murder.

On May 19, 2017, the jury found Griffis guilty of first degree murder (§ 187, subd. (a)) and shooting at an occupied building (§ 246). The jury found true the allegations that a principal personally and intentionally discharged a firearm causing great bodily injury and death in the commission of the two crimes (§ 12022.53, subds (d), (e)(1)) and the crimes were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members (§ 186.22, subd. (b)(1)(C), (b)(4)).

On August 25, 2017, the trial court sentenced Griffis to a total of 50 years to life in prison, consisting of 25 years to life for murder and a consecutive 25-year term for the firearm enhancement. The court sentenced Griffis to the high term of seven years for shooting at an occupied building, plus a consecutive 25 years for the firearm enhancement, with those terms to run concurrently with the terms on the murder count.

DISCUSSION

1. *Substantial Evidence Supports the Murder Conviction*

A. *Standard of Review*

Griffis contends the evidence is insufficient to support his first degree murder conviction based on either aiding and abetting or conspiracy. We review a challenge to the sufficiency of the evidence under the substantial evidence standard. (*People v. Gomez* (2018) 6 Cal.5th 243, 307 (*Gomez*).)

" 'When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Our review must 'presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' [Citation.] Even where, as here, the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might ' " 'be reasonably reconciled with the defendant's innocence.' " ' [Citations.] The relevant inquiry is whether, in light of all the evidence, a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citation.]" (*Gomez*, *supra*, 6 Cal.5th at p. 278.)

B. *Substantial Evidence Supports the Murder Conviction Based on Aiding and Abetting*

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Murder is of the first degree if it is committed willfully, deliberately, and with premeditation, or by means of discharging a firearm from a motor

vehicle with the intent to kill, or in other circumstances not relevant here. (§ 189(a).)

A person who aids and abets the commission of murder is a principal in the crime and is guilty of murder. (§ 31; *People v. Smith* (2014) 60 Cal.4th 603, 611; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.)

" ' "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " ' [Citation.]" (*People v. Penunuri* (2018) 5 Cal.5th 126, 146.) To convict a defendant of first degree murder as an aider and abettor, "the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Griffis argues the evidence does not support any of the three requirements for aiding and abetting. He argues there is no evidence he (1) knew the person entering the Malibu with a firearm intended to commit a murder, (2) specifically intended to encourage and facilitate such a murder, and (3) committed an act that in fact assisted in committing the crime.

Factors probative of aiding and abetting include the defendant's presence at the scene of the crime, companionship with the direct perpetrator, and conduct before and after the crime. (*People v. Ngyuen* (2015) 61 Cal.4th 1015, 1054.) " 'Evidence of a defendant's state of mind is almost inevitably

circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' [Citation.]" (*Id.* at p. 1055.)

Substantial evidence supports the jury's findings on all of the elements required to convict Griffis of first degree murder as an aider and abettor. The evidence shows Griffis was present with his fellow gang members in the laundromat when they decided to seek revenge. Griffis admitted he understood they were "Trying to go find something," and, "We was gonna just try to let—just let—let anger out . . . ." Griffis acknowledged the lead car was going to look for Rolling 30's members, and he understood that meant "they finna go shoot something or they finna go do something that they not supposed to." Griffis's statement that he knew Tiny M was the shooter because Tiny M was "the only one talking about it" suggests Tiny M spoke of using a firearm when the group was in the laundromat. The expert testimony that revenge murders are expected when a rival gang is suspected of killing a fellow gang member and gang members gain status by committing revenge murders also supports the conclusion Griffis knew his fellow gang members intended to kill.

Postings on Griffis's Facebook account shortly after midnight on March 15, 2016, including the words "Body for body" and a tribute to Smith with a gun emoji suggesting an act of revenge, are evidence Griffis had knowledge of and participated in the crime. The language, "we already went for blxxd" in a posting on Griffis's Facebook shortly after midnight on March 15 also tends to show his knowledge and participation. Moreover, his false statements to the police about various matters are

evidence of his consciousness of guilt. (*People v. Hughes* (2002) 27 Cal.4th 287, 335.)

We conclude the evidence is sufficient to support the finding Griffis knew his fellow gang members intended to commit a revenge murder.

As for his intent to encourage or facilitate a murder, the forgoing evidence is supplemented by Griffis's statements; "Like, it was more so, like, the older homie, he, like, that car finna—yeah. Like they finna do they thing. They finna do they job. And we just trailer." This suggests the driver told Griffis they would be trailing the lead car. Griffis acknowledged he was a passenger in the second car "trailing" the shooter. This evidence together with the gang expert testimony that a trail car commonly assists the lead vehicle by attracting attention away from the shooter, and evidence of Griffis's knowledge his fellow gang members intended to commit a revenge murder (discussed above), is sufficient to support the finding that Griffis intended to encourage or facilitate a revenge murder.

In short, in light of the foregoing evidence, the jury could reasonably find Griffis intended to kill and intentionally encouraged the commission of the revenge murder by riding in the second car as it followed the Malibu toward territory claimed by a rival gang. Further, even if the second car was not present at the time of the Ambrosio shooting, the jury could reasonably conclude the presence of a trail car when the Malibu first set out encouraged the commission of the crime.

C. *Substantial Evidence Supports the Murder Conviction as a Co-conspirator*

The prosecution's alternative theory of liability was that Griffis was guilty of first degree murder as a co-conspirator. A

defendant who conspires to commit murder is guilty of murder. (*People v. Valdez* (2012) 55 Cal.4th 82, 150.)

" 'One who conspires with others to commit a felony is guilty as a principal. [Citation.] " 'Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.' [Citations.]" [Citation.]' [Citation.] '[A]ll conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder.' [Citation.]" (*People v. Maciel* (2013) 57 Cal.4th 482, 515 (*Maciel*).)

A conspiracy conviction requires proof of (1) an agreement between two or more persons, (2) who have the specific intent to agree to commit an offense and (3) the specific intent to commit the offense, and (4) an overt act by one or more of the parties to the agreement in furtherance of the agreement. (*People v. Mullins* (2018) 19 Cal.App.5th 594, 607.)

Griffis argues the evidence is insufficient to support the findings on the existence of an agreement to commit a murder. In particular, he argues there is no direct evidence of his specific intent to make such an agreement, nor his specific intent to commit a murder. He alleges his statements to the police in the interrogation show there was no common plan.

" 'Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." ' [Citations.]" (*Maciel*, *supra*, 57 Cal.4th at pp. 515-516.)

Substantial evidence supports Griffis's murder conviction based on a conspiracy. Much of it is the same evidence that supported the aiding and abetting conviction. Griffis was present with his fellow gang members in the laundromat when they decided to seek revenge. Griffis admitted he understood they were "Trying to go find something," and, "We was gonna just try to let—just let—let anger out . . . ." He acknowledged the lead car was going to look for Rolling 30's members, and he understood that meant "they finna go shoot something or they finna go do something that they not supposed to." Griffis's statement he knew Tiny M was the shooter because Tiny M was "the only one talking about it" suggests Tiny M spoke of using a firearm when the group was in the laundromat. In light of the expert testimony that revenge murders are expected when a rival gang is suspected of killing a fellow gang member and gang members gain status by committing revenge murders, Griffis's statements suggest an understanding that his fellow gang members sought to commit a murder. While there is no direct evidence of an express agreement to commit a murder, the evidence supports a reasonable inference that the men in the laundromat at least tacitly agreed to commit a revenge murder. Griffis's Facebook postings ("Body for body" and gun emoji) and message ("we already went for blxxd") shortly after midnight following the Ambrosio shooting, described above, also suggest Griffis specifically intended to both agree to commit a murder and to commit a murder.

2. *Griffis Forfeited his Claim of Error Regarding the Gang Expert's Hypothetical and Has Not Shown Ineffective Assistance of Counsel*

Griffis contends the trial court erred by allowing improper expert testimony based on a hypothetical that did not track the facts in this case. He argues the expert both improperly expressed an opinion on Griffis's knowledge and intent and a legal opinion on whether a crime was committed. Griffis also argues his counsel's failure to challenge the testimony was improper assistance of counsel.

A *Applicable Law*

" 'California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id*., § 801).' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*).) " '[A]n expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." ' " (*Id.* at p. 1045.) " '[A] hypothetical question must be rooted in facts shown by the evidence. . .' " (*Ibid*.) " '[T]he expert's opinion may not be based on "assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' " (*Id.* at p. 1046.)

An expert may not offer an opinion on a question of law (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1176 (*Jo*)), and may not express an opinion on a defendant's guilt (*Vang*, *supra*, 52 Cal.4th at p. 1048).

" 'A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often

goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' " (*Vang*, *supra*, 52 Cal.4th at p. 1048.)

A party challenging the admission of evidence must make a timely and specific objection or motion to strike to preserve the issue for appeal. (Evid. Code, § 353, subd. (a); *People v. Abel* (2012) 53 Cal.4th 891, 924 (*Abel*).)

B. *Facts and Procedural Background*

The prosecutor first presented a hypothetical involving a Rolling 20's member who was killed within territory claimed by the Rolling 20's: Approximately four hours after the killing, Rolling 20's members drive in a car to territory claimed by the Rolling 30's. Before setting out they agree to either leave their cell phones behind or put them in airplane mode so they cannot be tracked. There is a liquor store at Jefferson and Ninth Avenue. They drive around the block in that area three times before Rolling 30's members exit the liquor store and shoot at the car. Three to five minutes later, the Rolling 20's members return to the same area driving in a different direction and shoot toward the liquor store using an AK-47, hitting and killing an innocent bystander on a bicycle.

The prosecutor asked Officer Thompson, as a gang expert, whether in his opinion under the facts in the hypothetical the murder and shooting at an occupied building were committed for the benefit of, at the direction of, or in association with the Rolling 20's. Officer Thompson stated his opinion that the crimes

in the hypothetical were committed for the benefit of and in association with the Rolling 20's.

The prosecutor later modified the hypothetical by adding a second car trailing behind the shooter's car, with both cars containing gang members with the common purpose "to revenge the murder of Mr. Smith." The prosecutor stated, "and the shooter's car is the one that goes around this Harlem 30's hangout multiple times; and that there's also—the second car is with Rolling 20's Bloods is a trail car, one that is going along as well to commit the crime but for different purposes, for the purposes you've described." He asked Officer Thompson whether in that scenario a person in the trail car would be committing a murder and shooting at an occupied dwelling in association with the Rolling 20's.

Officer Thompson answered, "Yes," and, "So[, l]ike we spoke about, they're associating together committing a crime together. So with that trail car if there is a trail car used in that crime, it's going to help the primary car, like I said, being used as a distraction for the witnesses for law enforcement. So it assists the primary car, primary shooting car possibly to get away with the crime."

Defense counsel did not object to the prosecutor's question or move to strike the testimony.

Instead, on cross-examination, defense counsel asked Officer Thompson further questions about gang members' use of trail cars. Defense counsel presented a hypothetical involving a trail car that drives away after the lead car is fired upon, and asked whether in that scenario a person in the trail car was acting for the benefit of a criminal street gang with the specific intent to further the gang's criminal activity. Officer Thompson

answered, "I would say if that trail car left with the intent to go with that shooter's car, then they were there with the intent to commit a crime in the furtherance of the gang."

The cross-examination continued:

Defense counsel: "However, let me change the hypothetical just slightly. Let us say although we can't know what the trail car's driver was thinking, but if that trail car was a trail car that was performing the initiation function. In other words, showing an inexperienced gang member how it's done, and they were not armed so they could not provide cover, and once they saw that the lead car had been shot at, they decided to leave rather than risk injury or death, they just left after the initial shooting where the lead car is shot at by rival gang members in rival gang territory, would you say that the subsequent shooting two minutes later, that that subsequent shooting, that even though the trail car is gone, two minutes away, whichever direction, east, west, north, or south, would it still be your opinion that the occupants of that trail car were guilty of the murder for the benefit of, at the direction of, or in association with a criminal street gang?"

Officer Thompson: "I would say with the association—if I'm understanding your question correctly, if that car was simply just there to validate or to show the younger gang member what was going on, that would definitely—that would benefit the gang, because now you're showing a younger generation, you know, how we will go commit this crime, how they will go commit a shooting. So what that does is that gives the younger generation more experience. And the more experienced the gang member is, the more it benefits that gang to commit other crimes."

Defense counsel: "But would you still say then that even though they may have been two miles, three miles, four miles down the road, nowhere near the location where the actual shooting took place of the innocent bystander, that that still could be attributed to the people in the trail car?"

Officer Thompson: "Based on my understanding of the question, like I say, it would benefit the gang because of them showing the knowledge of, 'hey, this is how we go do a shooting, a drive-by shooting, a murder.' So if it's showing them and making the younger gang members more experienced, then yes, it would."

Defense counsel: "Do you feel that the murder itself, even though unwitnessed by the new gang member in the company of the older gang member, that it would still apply, your opinion still remains the same?"

Officer Thompson: "Yes."

C. *Analysis*

Griffis argues the prosecutor's modified hypothetical was improper because, contrary to the facts in the hypothetical, there is no evidence the second car was trailing the shooter's car at the time of the murder. He also argues Officer Thompson improperly offered an opinion on guilt and a legal opinion on whether a crime was committed. Griffis forfeited these claims of error by failing to timely object to the hypothetical and testimony on these grounds. (Evid. Code, § 353, subd. (a); *Abel*, *supra*, 53 Cal.4th at p. 924.)

Griffis also claims ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency

resulted in prejudice to the defendant, meaning there is "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).) " 'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.]' " (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

"It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*Mai*, *supra*, 57 Cal.4th at p. 1009.) "[S]uch matters as whether objections should be made and the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel." (*Id.* at p. 1018.)

On this record, we cannot conclude there is no satisfactory explanation for defense counsel's failure to object to the prosecutor's hypothetical. Defense counsel could have made a rational tactical decision not to object for a number of reasons, including his intention to reveal its fallacy by presenting his own hypothetical more closely matching his version of the facts in this case, as he did on cross-examination. We will not second-guess counsel's tactical decisions. Griffis has not shown his defense

counsel rendered ineffective assistance by failing to object to the hypothetical or the expert's testimony.

The ineffective assistance claim also fails because Griffis cannot show prejudice resulting from defense counsel's failure to object to the hypothetical or to Officer Thompson's testimony. The trial court instructed the jury counsel's statements were not evidence, the facts stated in a hypothetical question were not necessarily true, and the jury must decide whether the facts assumed in a question had been proved. We presume the jury understood and followed the instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.) Defense counsel's own hypothetical involving a trail car driving away prior to the shooting emphasized Griffis's version of the events. In these circumstances, there is no reason to believe the prosecutor's hypothetical or Officer Thompson's answer prejudicially influenced the jury's view of the evidence. Moreover, as discussed above, there was compelling evidence Griffis conspired to commit or aided and abetted a murder.

3. *Griffis Forfeited his Claim of Error Concerning Expert Testimony on his Gang Membership and Has Not Shown Ineffective Assistance of Counsel*

Griffis contends the trial court violated his constitutional right of confrontation by allowing an expert to base an opinion that he was a gang member on inadmissible testimonial hearsay. He argues Officer Thompson's testimony improperly related case-specific hearsay concerning his purported gang tattoos, prior contacts with the police, and the alleged gang membership of others shown with him in photographs. Griffis also argues his counsel rendered ineffective assistance by failing to object to the testimony.

A. *Applicable Law*

"When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. omitted, emphasis omitted.)

B. *Factual and Procedural Background*

Officer Thompson stated his opinion that Griffis was a Rolling 20's member because "he's been seen wearing gang attire, he has gang tattoos, he's commonly stopped in the Rolling 20's area, and he's been stopped with multiple other Rolling 20's gang members." Officer Thompson testified he also considered photographs showing Griffis making gang signs and other Facebook records. Defense counsel did not object to the testimony.

Officer Thompson did not testify he personally observed gang tattoos on Griffis, nor did any other witness. Officer Schneider testified Griffis was a passenger together with other Rolling 20's members in the white Malibu he stopped in February 2016 in territory claimed by the Rolling 20's, but there was no evidence of any other stops involving Griffis.

Officer Thompson testified several men appearing with Griffis in photographs posted on social media were members of the Rolling 20's. Officer Thompson stated he had personal

knowledge some of the men were gang members based on his contacts with them, but neither Officer Thompson nor any other witness testified to such personal knowledge as to other men he described as gang members.

C. *Analysis*

Griffis forfeited any objection to Officer Thompson's testimony concerning his gang membership by failing to timely object. (Evid. Code, § 353, subd. (a); *Abel*, *supra*, 53 Cal.4th at p. 924.)

Griffis's claim of ineffective assistance of counsel fails because he cannot show prejudice resulting from his trial counsel's failure to object to the testimony. (*Mai*, *supra*, 57 Cal.4th at p. 1009.) There was ample evidence Griffis was a Rolling 20's member apart from the challenged testimony.

Griffis self-identified as a Rolling 20's member on several occasions. Officer Schneider testified Griffis self-identified as a Rolling 20's member during a traffic stop in February 2016. Officer Rivera testified Griffis self-identified as a Rolling 20's member at the vigil. In the recorded interrogation, Officer Castro asked, "Do you gangbang?" Griffis responded, "Yeah." Officer Castro asked, "From where?" Griffis responded, "20's."

Records from Griffis's Facebook account included a message to Pearson identifying the sender as "Chris," a message from Pearson stating her cross streets within the Rolling 30's neighborhood, and a message to Pearson stating, "im from twentys." Another message to Pearson stated he would not go into the Rolling 30's neighborhood, indicating he considered it rival territory. According to Officer Thompson, "RTBIP," as stated on Griffis's Facebook account with reference to Smith, was indicative of a Rolling 20's member paying tribute to a fellow

Rolling 20's member who had died. Other references to Rolling 20's and other unusual language on Griffis's Facebook account, interpreted by Officer Thompson, also suggested he was a member.

Several photographs showed Griffis and others gathered together displaying what Officer Thompson described as Rolling 20's gang signs and hand signs showing disrespect for Rolling 30's or Crips in general, and wearing clothing or other items showing allegiance to the Rolling 20's. Even without identifying the others in the photographs by name and assuming no other evidence of their gang affiliation, the photographs themselves were strong evidence of Griffis's gang membership.

Moreover, in closing argument, defense counsel conceded Griffis was a gang member: "I'm not going to insult you folks's intelligence by standing up here and trying to tell you or persuade you that my client is not a gang member. We will concede, my client is a gang member. There's more than enough photos that you have seen to verify that, in fact, he was a gang member."

Based on the evidence presented at trial apart from the testimony Griffis challenges now, no reasonable jury could have found Griffis was not a Rolling 20's member, so defense counsel's failure to object was harmless under either the federal *Chapman* standard (*Chapman v. California* (1966) 386 U.S. 18, 24 [87 S.Ct. 824] [error must be harmless beyond a reasonable doubt]) or California's *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836 [error is prejudicial unless it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]).

4. *Griffis Forfeited his Claim of Error Concerning the Recorded Interrogation and Has Not Shown Ineffective Assistance of Counsel*

Griffis contends the trial court erred by admitting his recorded interrogation without redacting prejudicial comments by the police. The prejudicial comments included accusations of lying, stating others had implicated him in the crimes, references to his prior arrest and warrant, and a legal opinion on his responsibility for the murder. He also argues his counsel rendered ineffective assistance by failing to object to the evidence.

A. *Applicable Law*

Statements made by police officers during an interrogation may contain hearsay. Such statements are inadmissible if offered for the truth of the matter asserted, unless they qualify under the hearsay exception for adoptive admissions (Evid. Code, § 1221). (*People v. Sanders* (1977) 75 Cal.App.3d 501, 507-508 (*Sanders*).) Questions and statements made by officers may be offered for the nonhearsay purpose of giving context to the suspect's responses, however. (*Maciel*, *supra*, 57 Cal.4th at p. 524.) *Maciel* stated, "the officers' statements that defendant had 'set . . . up' the murders in this case were not 'inadmissible hearsay.' Rather, they served the nonhearsay purpose of giving context to defendant's responses." (*Ibid*.)

Evidence of prior misconduct is inadmissible to show a defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a); *People v. Jackson* (2016) 1 Cal.5th 269, 299-300.) " ' "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record

and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." [Citation.]' [Citation.]" (*Id.*, at p. 300.)

Statements made by the police during an interrogation concerning other crimes committed by the defendant should be redacted if their probative value of providing context to the suspect's responses is substantially outweighed by the probability of undue prejudice, confusing the issues, or misleading the jury (Evid. Code, § 352). (*People v. Guizar* (1986) 180 Cal.App.3d 487, 491-492 (*Guizar*) [reference to prior murders].)

An expert witness may not offer an opinion on a question of law (*Jo*, *supra*, 15 Cal.App.5th at p. 1176), and may not express an opinion on a defendant's guilt (*Vang*, *supra*, 52 Cal.4th at p. 1048).

B. *Factual and Procedural Background*

At several points during the interrogation, the officers accused Griffis of lying and encouraged him to tell the truth. The officers stated information gathered from other witnesses had led them to Griffis. The officers engaged in a ruse, stating they had information Griffis was a passenger in the Malibu and was "over in that area when it happened." After initially denying any knowledge of or involvement in the Ambrosio murder, Griffis changed his story, identified two drivers and the shooter, and stated he was only a passenger in the trail car.

The officers told Griffis they had information he was previously arrested for a robbery with his "homies" and pled to a lesser charge as an accessory while the others were convicted of robbery. They said getting off easy while his homies took "the

full rap" created resentment, so his homies would not protect him. The officers also referred to a warrant for theft.

As noted above, Officer Courtney stated: "I don't know if you don't understand, and let me explain it to you is that whether you were in this second car or you're—and not shooting—or you're in that—you're in that first car and you're not shooting, it's the same difference. It means the exact same thing. It's only different if you're pulling the trigger. [¶] So whether you tell us you're in car B or—and just sitting there as a bystander watching what's going on or you're in car A doing the exact same thing, in the eyes of the law, that's the same thing. There's no difference between it."

C. *Analysis*

Griffis did not object to the admission of the recorded interrogation or request any redaction and therefore forfeited his claims of error. (*People v. Riccardi* (2012) 54 Cal.4th 758, 801-802, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192; *People v. Fuiava* (2012) 53 Cal.4th 622, 670.)

Griffis's claim of ineffective assistance of counsel also fails. On this record, we cannot conclude there is no satisfactory explanation for defense counsel's failure to object to the officers' comments that Griffis was lying and that others had implicated him in the crimes. The theory of defense was Griffis was only in the trail car and was unaware of any plan to commit murder. Defense counsel argued in closing that after he realized the officers did not believe him, Griffith decided to tell the truth, including his statement he did not know what was going to happen that night. This suggests defense counsel could have made a rational tactical decision not to object to or seek to redact

the officers' comments about lying because those comments arguably supported his theory of defense.

Sanders, *supra*, 75 Cal.App.3d 501, is distinguishable. *Sanders* held the admission of an unredacted recording and transcript of an interrogation, including long and detailed narrative statements by police officers containing hearsay, was error. (*Id*. at p. 508.) *Sanders* did not involve a claim of ineffective assistance of counsel. In contrast to the statements in *Sanders*, the officers' comments about lying were brief and general. Moreover, *Sanders* did not hold the admission of the unredacted interrogation alone required reversal, but held such admission together with the "worse problem" of a prejudicially erroneous jury instruction required reversal. (*Id*. at pp. 508, 511-512.)

Griffis also cites *People v. Sundlee* (1977) 70 Cal.App.3d 477. *Sundlee* involved a recording and transcript of comments and observations shared by members of a surveillance team as they watched the defendant, an arson suspect, enter a construction yard and disappear from sight before a shed burst into flames. (*Id*. at pp. 481-482.) The incriminating comments were hearsay because they were offered to prove the truth of the matter stated. (*Id*. at pp. 483-484.) The defense did not object to the evidence. (*Id*. at p. 482.) *Sundlee* concluded defense counsel's representation was inadequate and the failure to object was prejudicial, and reversed. (*Id*. at p. 485.) The reviewing court did not discuss whether counsel could have had a rational tactical purpose for failing to object, but apparently concluded there could be no satisfactory explanation. Here, in contrast, defense counsel could have had a rational tactical purpose for failing to object.

The officers' references to Griffis's role as an accessory to a prior robbery and an arrest warrant for theft were not particularly prejudicial to an admitted gang member being prosecuted for murder and shooting at an occupied building. Unlike the prior murders referenced in *Guizar*, *supra*, 180 Cal.App.3d 487, involving a murder prosecution, the other crimes here were less serious than the crimes charged, so the probability of prejudice was not as great. Defense counsel argued in closing that Griffis "was a newcomer to the [gang] scene" and "didn't really know what was going on." Defense counsel could have made a rational tactical decision not to object to the references to Griffis's relatively modest criminal history because those references arguably supported his theory of defense.

Officer Courtney's statement, "in the eyes of the law," if Griffis was not the shooter, it was the same whether he was a passenger in the lead car or the second car, expressed a legal opinion or perhaps a conclusion about Griffis's guilt under the facts in this case. Griffis cites nothing in the record affirmatively showing his defense counsel had no rational tactical purpose for failing to object. (See *Mai*, *supra*, 57 Cal.4th at p. 1009.) " '[S]uch matters as whether objections should be made and the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel.' " (*Id.* at p. 1018.) We cannot conclude based on the appellate record there simply could be no satisfactory explanation. (See *id.* at p. 1009; *Lopez*, *supra*, 42 Cal.4th at p. 966 [" 'If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to

provide one, or unless there simply could be no satisfactory explanation" ' "].)

The ineffective assistance claim also fails because Griffis cannot show prejudice resulting from defense counsel's failure to object. Griffis's changing story itself indicated he was being untruthful. The references to his prior arrest and warrant involving lesser crimes were relatively innocuous, and, as discussed above, there was compelling evidence that Griffis conspired to commit or aided and abetted a murder.

5. *The Trial Court Properly Admitted the Social Media Evidence*

Griffis contends the trial court erred by admitting unauthenticated social media evidence. He argues there is no evidence he owned the "Gt da Mess" Facebook account or was the author of the material posted on the account and no evidence the photographs were not altered.

A. *Applicable Law*

A writing must be authenticated before it is admitted in evidence. (Evid. Code, § 1401, subd. (a); *People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

A writing is admissible only if the trial court finds there is sufficient evidence for the trier of fact to find the writing is what it purports to be. (Evid. Code, § 403, subd., (a)(3); *Goldsmith*, *supra*, 59 Cal.4th at p. 267.) "Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact

conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*Goldsmith*, at p. 267.)

"The means of authenticating a writing are not limited to those specified in the Evidence Code. [Citations.] For example, a writing can be authenticated by circumstantial evidence and by its contents. [Citations.]" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187; see also *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 (*Valdez*) ["The author's testimony is not required to authenticate a document ([Evid. Code,] § 1411); instead, its authenticity may be established by the contents of the writing (§ 1421) or by other means (§ 1410 [no restriction on 'the means by which a writing may be authenticated']".) We review the trial court's ruling on the admissibility of evidence for abuse of discretion. We will not disturb the ruling unless the court acted in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*Goldsmith*, *supra*, 59 Cal.4th at p. 266.)

A party challenging the admission of evidence must make a timely and specific objection to preserve the issue for appeal. (Evid. Code, § 353, subd. (a); *Abel*, *supra*, 53 Cal.4th at p. 924.) " '[W]hen an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection. (Evid. Code, § 353.)' [Citation.] 'What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully

informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.' " (*Abel*, at p. 924.)

B. *Factual and Procedural Background*

Officer Thorsten Timmermans testified he had obtained many warrants to receive records from social media accounts on Facebook and Instagram and then received the documents electronically from those companies. On other occasions, someone else obtained the warrants and Officer Timmermans reviewed the records. He testified he had reviewed thousands of pages of Facebook and Instagram records in this case.

Defense counsel asserted a hearsay objection.[8] At sidebar, the trial court asked the prosecutor how he intended to authenticate the records and how he had obtained the records. The prosecutor stated another officer had obtained the Facebook records using a search warrant. The court stated receiving the records in response to a search warrant was adequate authentication.[9]

Regarding hearsay, the trial court said any statements by the defendants would be party admissions. The court asked about statements on the accounts made by individuals other than

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[8] Griffis does not argue on appeal the records were hearsay.

[9] Officer Courtney later testified he had obtained the records from Facebook and Instagram, including records for the "Gt da Mess" Facebook account, using search warrants.

the defendants. The prosecutor stated, "May I ask if counsel has any specific objections to any of those statements, because we would have to deal with one at a time." Defense counsel stated, "I was expecting a custodian of records to come in and say—I was just expecting a custodian of records to come in and authenticate that these are in fact Facebook records and Instagram records."

Discussing the matter further, defense counsel expressed authentication concerns regarding the source of the records, but did not object to any statements on grounds there was no basis to conclude Griffis was the author of the statements. After further testimony, the trial court again expressed concerns regarding authentication, but concluded receiving the records in response to a search warrant was sufficient authentication with respect to the source of the records. The court distinguished the issue of the source of the records from the author of the statements contained in the records and asked, "Is there anything specific that you're objecting to? Is it just a general objection to allowing him to testify about Facebook records?"

Griffis's counsel responded, "General objection." Livingston's counsel agreed. The trial court stated, "Well, then if that is the objection, then that objection will be overruled."

C. *Analysis*

Griffis objected to the social media evidence on grounds of lack of authentication as to the source of the records, but he never objected on the specific grounds of lack of evidence he was the owner of the account or the author of material posted on the account, and he never objected on grounds the photographs could have been altered. We therefore conclude he forfeited his claim of error regarding lack of authentication on those grounds. (Evid. Code, § 353, subd. (a); *Abel*, *supra*, 53 Cal.4th at p. 924.)

In any event, there was sufficient evidence to support a finding Griffis controlled and was the author of the statements on the "Gt da Mess" Facebook account. Griffis acknowledged the account belonged to him by stating in the interrogation, "That's one I—I—I—don't know my password to." Discussing the matter with Livingston after the interrogation, Griffis said, "they said my Facebook," and, "I'm still trying to figure out how they get on my Facebook." Griffis appeared in numerous photographs posted on the account, and a message sent from the account identified the sender as "Chris." This evidence tends to show he controlled the content on the account. (*Valdez, supra,* 201 Cal.App.4th 1429, 1435 [personal photographs, communications, and other indicia of ownership and control were sufficient to authenticate a MySpace page].)

Regarding the source of the records, there was sufficient evidence to support a finding the records came from Facebook. Officer Timmermans explained the process of obtaining a search warrant for Facebook records and receiving the records from Facebook. Officer Courtney testified he had written a search warrant and obtained records from Facebook for an account under the name "Gt da Mess." The records themselves included a face sheet and stated on each page "Facebook business record." Officer Timmermans testified this was true of all the records he ever had received from Facebook in response to a search warrant. Officer Timmermans stated he usually received a signed letter of authenticity from Facebook, but did not in this case. Despite the lack of a letter of authenticity, the evidence was sufficient to establish authenticity, with any doubts concerning authenticity going to the weight of the evidence rather than its admissibility. (*Goldsmith*, *supra*, 59 Cal.4th at p. 267.)

6. *There Was No Cumulative Prejudice*

Griffis contends the errors were cumulatively prejudicial. He has not shown error, however, so there is no error to cumulate, and his claim of cumulative prejudice fails. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 293 ["We have found no errors to cumulate and thus no possible cumulative prejudice"].)

7. *Griffis Has Shown No Error in the Firearm Enhancement*

Griffis argues a firearm enhancement under section 12022.53, subdivision (c)(1) only applies to a principal in the crime. He argues he was a principal only if the jury found him guilty as an aider and abettor (§ 31), and he was not a principal if the jury found him guilty based on a conspiracy theory alone. We disagree. A co-conspirator is guilty as a principal. (*Maciel*, *supra*, 57 Cal.4th at p. 515 [" 'One who conspires with others to commit a felony is guilty as a principal' "].) Griffis has shown no error in the firearm enhancement.

8. *The Case Must Be Remanded for Resentencing*

At the time of Griffis's sentencing in August 2017, the trial court had no authority to strike a firearm enhancement under section 12022.53. As amended by Senate Bill 620 (2017-2018 Reg. Sess.), effective January 1, 2018, section 12022.53, subdivision (h) now gives the sentencing court the discretion to strike a firearm enhancement in furtherance of justice.

Accordingly, as the People concede, the trial court must be given the opportunity on remand to decide whether to exercise its discretion under section 12022.53, subdivision (h), as amended.

DISPOSITION

The convictions are affirmed. The case is remanded with directions to the superior court to decide whether it will exercise its discretion to strike the firearm enhancement. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 34-35.) At this remand hearing, the defendant has the right to the assistance of counsel and, unless he chooses to waive it, the right to be present. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258-260.) If the court elects to exercise this discretion, the defendant shall be resentenced and the Abstract of Judgment amended.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.